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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 259

JAMES A. RHODES, in his capacity as Governor of the State of Ohio; KINGSLEY A. TAFT, in his capacity as Chief Justice of the Ohio Supreme Court; ANTHONY O. CALABRESE, JOHN J. CORRIGAN and DAVID T. MATIA, as members of the Ohio Senate on behalf of themselves and all other persons similarly situated; ANTHONY O. CALABRESE, JR., JAMES P. CELEBRESSE and JOHN F. CORRIGAN, as members of the Ohio House of Representatives on behalf of themselves and other persons similarly situated; FRANK M. GORMAN, HENRY W. SPEETH, and WILLIAM P. DAY, in their capacity as county commissioners for Cuyahoga County,

Petitioners,

vs.

NATHANIEL BUCHANAN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM B. SAXBE
Attorney General of Ohio
CHARLES S. LOPEMAN
Chief Counsel
State House Annex
Columbus, Ohio 43215
Attorneys for Petitioners.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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OPINIONS BELOW

The United States Court of Appeals rendered no printed opinion but remanded by a *per curiam* order. Such order is printed in the appendix. The opinion of the United States District Court for the Northern District of Ohio is reported at 249 F. Supp. 860 (N.D. Ohio 1966) and is printed here in the appendix.

In addition this case was before this Court as No. 1272, October term, 1965 and dismissed by this Court *per curiam. Buchanan v. Rhodes,* 385 U.S. 3 (1966).

JURISDICTION

By 28 U.S.C. 1254(1) this Court has jurisdiction to grant a Writ of Certiorari to review the decision below rendered and order entered April 3, 1968.

QUESTION PRESENTED

Does a United States District Court have jurisdiction to hear and thus a duty to seat a three-judge court where the relief sought is a declaration that Ohio's judicial structure is unconstitutional, a mandatory injunction directing the Ohio General Assembly to reapportion the common pleas judges among the counties and an order directing the county commissioners for Cuyahoga County to build a better court house such request for relief being predicated on alleged rights created by the Fourteenth Amendment violated by an alleged four-year docket delay in Cuyahoga County compared with lesser delays in other Ohio Counties?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides in part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Section Three of Article IV of the Ohio Constitution provides in part as follows:

> "One resident judge of the Court of Common Pleas and such additional resident judge or judges as may be provided by law, shall be elected in each county of the state by the electors of such county; and as many courts or sessions of the Court of Common Pleas as are necessary, may be held at the same time in any county. Any judge of the Court of Common Pleas may temporarily

preside and hold court in any county; and until the General Assembly shall make adequate provision therefor, the Chief Justice of the Supreme Court of the state * * * may assign any judge to any county to hold court therein."

Section 2301.02 of the Ohio Revised Code (as amended effective December 9, 1967), makes specific provision for the number of judgeships allotted to each county; which in pertinent and sample part reads:

"In Wayne county, two judges, one elected in 1956, term beginning January 1, 1957, and one to be elected in 1968, term to begin January 2, 1969;

"In Trumbull county, four judges, one to be elected in 1952, term to begin January 1, 1953, the second to be elected in 1954, term to begin January 1, 1955, the third to be elected in 1956, term to begin January 1, 1957, the fourth to be elected in 1964, term to begin January 1, 1965;

"(C) In Cuyahoga county, twenty-eight judges; eight to be elected in 1954, terms to begin on successive days beginning from January 1, 1955, to January 7, 1955, inclusive, and February 9, 1955, respectively; eight to be elected in 1956, terms to begin on successive days beginning from January 1, 1957, to January 8, 1957, inclusive; three to be elected in 1952, terms to begin from January 1, 1953, to January 3, 1953, inclusive; two to be elected in 1960, terms to begin on January 8, 1961, and January 9, 1961, respectively; two to be elected in 1964, terms to begin January 4, 1965, and January 5, 1965, respectively; one to be elected in 1966, term to begin on January 10, 1967; and four to be elected in 1968, terms to begin on successive days beginning from January 9, 1969, to January 12, 1969, inclusive;

"In Franklin county, thirteen judges; two to be elected in 1954, terms to begin January 1, 1955, and February 9, 1955, respectively; four to be elected in 1956, terms to begin January 1, 1957, to January 4, 1957, inclusive; four to be elected in 1958, terms to begin January 1, 1959, to January 4, 1959, inclusive; and three to be

elected in 1968, terms to begin January 5, 1969, to January 7, 1969, inclusive;"

Pertinent here also is most of Title 23 of the Revised Code of Ohio, which is too voluminous to reprint here. In addition, various other sections bearing on the jurisdiction and functioning of the Ohio judicial process are also here pertinent and any decree granting the relief sought below would necessarily take cognizance of many other sections of the Revised Code among which are Sections 1901.17, 141.05, 4301.31.

STATEMENT OF CASE

The following is that part of the statement of the case made by plaintiff-appellant (respondent here) in the court below, which described the parties and the allegations of the complaint and the relief sought:

> "This action is brought by 19 citizens and residents of Cuyahoga County (the County encompassing greater Cleveland, Ohio). The Amended Complaint points out that each of the plaintiffs (except those identified as minors) is also an elector and taxpayer of that county and state. Fourteen of the plaintiffs had pending civil actions for damages in the Court of Common Pleas for Cuyahoga County, which is the court of general jurisdiction provided by state law in Ohio. Five of the plaintiffs are duly licensed Ohio attorneys who regularly practice before the Common Pleas Court of Cuyahoga County. The defendants are the Governor of the State of Ohio, the Chief Justice of the Ohio Supreme Court, the Ohio Legislature through representative members of that class, and the County Commissioners for Cuyahoga County. The suit concerns the greatest single problem in the modern administration of justice—docket delay.
>
> "In substance the Amended Complaint describes a denial of Due Process and Equal Protection as a result of

the Ohio constitutional provisions requiring at least one judgeship in every county and the numerical distribution of judgeships provided by the Ohio Code. For example, the Amended Complaint points out that during the year preceding the commencement of this action, Cuyahoga County and seven other urban counties were represented by and served by common pleas judges with a ratio of 75,000 or more persons for each judge, while 18 Ohio counties were represented by and served by common pleas judges at a ratio of one judge per 25,000 persons or less. Indeed one Ohio county was represented by and served by a separate common pleas judge even though its population was only 10,000 persons. The Amended Complaint and affidavit evidence before the Court further asserts gross inequality in access to the courts in part as a result of the disproportionate allocation of judgeships, with a docket waiting time in some counties of six months and a docket waiting time in Cuyahoga County of four years or more. The Amended Complaint describes each of these inequalities as a denial of Equal Protection guaranteed by the Fourteenth Amendment.

"Next, the Amended Complaint refers to the unreasonable and extraordinary delay from the time a case is filed in the Cuyahoga County Common Pleas Court until it is called for trial, which has now grown to four years or longer, as a denial of Due Process. Affidavit evidence submitted by counsel for plaintiffs and defendants demonstrated a consistent and systematic procedure of assigning judges elected in other counties to serve the citizens of Cuyahoga County who had no part in their election, which constitutes another infringement of the Due Process guarantee.

"The Amended Complaint seeks several forms of equitable relief, including (a) a declaratory judgment that the provisions of the Ohio Constitution and the Ohio Code which lead to the disproportionate allocation of judgeships violate the Federal Constitution, (b) a mandatory injunction directing the state legislature to provide a more appropriate allocation of judgeships, (c) a mandatory injunction directing the

Chief Justice of the Supreme Court to reassign *temporarily* various Common Pleas Judges to Cuyahoga County so as to temporarily mitigate the delay and associated denial of due process, (d) a mandatory injunction directing the County Commissioners for Cuyahoga County to provide suitable and adequate courtrooms and facilities for additional judges, and (e) the exercise of continuing jurisdiction by the District Court to accomplish the purposes of this litigation."

Following the commencement of this action, the County Commissioners filed their answer, but the other defendants filed a motion to dismiss or for summary judgment with attached affidavits. Plaintiffs filed a motion to assemble a three-judge District Court under the provisions of 28 U.S.C., Sections 2281 and 2284. Plaintiffs also filed a motion for summary judgment with affidavits attached. The court overruled plaintiffs' motion for the convening of a three-judge court, and granted defendants' motion to dismiss the action. (See opinion of court in appendix.) Plaintiff then sought review in this Court which found it was without jurisdiction. (See above.) They then sought review in the United States Court of Appeals for the Sixth Circuit, which Court reversed the District Court on procedural grounds only and remanded for the seating of a three-judge Court.

It is petitioners' contention that there was no jurisdiction in the District Court because although plaintiff below alleged federal questions were involved they are "plainly insubstantial", i.e. "essentially fictitious" because "obviously without merit". And therefore the court had no jurisdiction. *Bailey v. Patterson,* 369 U.S. 316 (1962); *Newburgport Water Co. v. Newburgport,* 193 U.S. 561 (1904).

The statutes that respondent alleged in his original complaint gave the court jurisdiction are 28 U.S.C.A. 1331 (a), 1343 (3), 1357, 2201 and 42 U.S.C.A. 1983 and 1988.

ARGUMENT

Nearly the same complaint as the one at bar was filed in the United States District Court for the Southern District of New York and was there dismissed for want of jurisdiction. *New York State Association of Trial Lawyers v. Rockefeller,* 267 Fed. Supp. 148 (1967). The District Court in the case at bar ruled that since the claim for relief was "patently without merit" it could be dismissed (without seating a three-judge court) for "failure to state a claim upon which relief can be granted" citing rule 12(b) (6) Federal Rules of Civil Procedure. This technically was not correct as the threshold "substantiality" question is really one of jurisdiction as pointed out by the "New York" District Court in its excellent opinion cited above.

However the "Ohio" District Court quoted and applied the proper standard in arriving at its conclusion in the case at bar. It may have been this technical error which prompted reversal and remand for the seating of a three-judge court. The Court of Appeals order is somewhat cryptic as to its reasons for remand and all parties will necessarily be perplexed as to what is left open for the District Court to decide. Must a three-judge District Court consider the merits or is such a court free to determine jurisdiction and find it wanting?

Notwithstanding what the District Court declared it was doing in its opinion dismissing the complaint, the Court of Appeals should have declared that a federal court has no jurisdiction to declare and perform the kinds of things sought by the complaint.

It is of first importance to the states of this union that this Court declare that there are certain problems that by their very nature cannot be solved by judicial act or declar-

ation. It is of first importance that this Court declare that the federal judiciary simply has no power or authority to hear cases which by their essential nature are non-justiciable. Some problems are essentially political and must be left to the political process to work out primarily through the coordinate and political branches of government.

Certainly this was implicit in the landmark decision of *Baker v. Carr,* 369 U. S. 185 (1962) and other legislative reapportionment cases that followed. It was without doubt the vital and essential importance this Court knew the legislative branch of government plays in solving the problems of a republican constituted democracy—even the problems involving federal constitutional rights—that prompted this Court to break with well considered precedent, cut the vicious circle of malapportionment and make the political process more responsive to the needs and will of the people. This done, the renovated and rejuvenated political process, must be left to solve the problems—even constitutional ones —that it has traditionally solved and which it only is equipped to solve.

Moreover, in *Baker v. Carr,* the standard was ascertainable from the constitution itself without resort to reams of facts not evolving out of a case and controversy but general and legislative in nature. Furthermore, once the standard was discovered in the constitution, it could be easily applied —one man, one vote. But even this simple standard has met with great difficulties in application as Ohio well knows. But the great purpose of, and necessity for legislative reapportionment has made the undertaking worth the difficulties.

Now for the federal courts to take jurisdiction of this case (as the Court of Appeals seems to have ordered) a case of infinitely greater complexity, seeking remedies foreign to very nature of the powers courts have to effect

change and remedy wrongs, is to strip *Baker v. Carr* of its meaning and salutory purpose. It invites trespass into the fundamental domain of state government—state government now made as politically responsive as federal judicial power, stretched to its limits, can make it.

And the salutory effects of *Baker v. Carr* and, more particularly, for Ohio, *Nolan v. Rhodes,* 378 U. S. 556 (1964), are seen in the invigorated effort Ohio has made in its continuing effort to solve the very problem respondent complains of—docket delay in big cities. The recent (1967) Ohio Legislature created many new judgeships for Ohio, including four, (making 28 in all) for Cuyahoga County. Moreover, Cuyahoga County has recently made administrative reforms to solve its docket problems by adopting a "certificate of readiness" system. And, finally, this May by the most direct political process, referendum, Ohio voters amended the Ohio Constitution to update the judiciary. The Legislature proposed the amendments; the Ohio bench and bar vigorously campaigned for their passage in the best tradition of seeking solution to *political* problems through *political* process. Art. IV, Secs. 1, 2, 3, 4, 5, 6, (7, 8, 10, 12, 14), Constitution of Ohio, and Art. II, Secs. (12, 13). (Parts in parenthesis were repealed.)

The above reforms are not catalogued to mitigate the alleged wrongs respondent set forth in his complaint. There is no need to reach the merits of the alleged wrongs for there is no federal judicial power to correct them even if true. Rather, some of the recent reforms are listed as concrete illustrations of the political nature of the problem to which judicial solution is here inappropriately sought.

The petitioners count it of first importance that this Court take cognizance of and decide this threshold question of jurisdiction—is the alleged federal question so patently

without merit as to be essentially non-existent, basically frivolous? The alleged wrongs in themselves may or may not be frivolous—but the seeking of judicial solutions to them is. This question of jurisdiction goes to the heart of both our federal system and our checks and balances constitution; we ask this Court issue a Writ of Certiorari to the Court of Appeals.

WILLIAM B. SAXBE,
Attorney General

CHARLES S. LOPEMAN
Chief Counsel
Attorneys for Petitioner.

APPENDIX

No. 17,557

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATHANIEL BUCHANAN, etc., et al.,
Plaintiffs-Appellants,

vs.

THE HONORABLE JAMES A. RHODES, etc., et al.,
Defendants-Appellees.

(Filed April 3, 1968—Carl W. Reuss, Clerk)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Decided [April 3, 1968]

Before: PHILLIPS, EDWARDS and MCCREE, Circuit Judges

PER CURIAM. In this case appellants attack as federally unconstitutional the provision of Ohio's constitution and statutes which provide for the election and assignment of Ohio's trial judges. The District Judge before whom this complaint was filed dismissed the complaint without convening a three-judge court. The factual background and legal issues are fully stated in his opinion. *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1966).

On consideration of the procedural aspects of this appeal only, the judgment of the District Court is vacated and the case is remanded to the District Court for the convening of a three-judge court under 28 U.S.C. section 2281 (1964).

ORDER

(Entered February 2, 1966.)

Upon consideration,

IT IS ORDERED that the plaintiffs' motion pursuant to 28 U. S. C. 2281 and 2284 requesting this District Court to assemble a three judge court for the determination of this case is overruled; further,

IT IS ORDERED that the defendants' motion to dismiss is granted; therefore,

IT IS ORDERED that the complaint is hereby dismissed at plaintiffs' costs.

JAMES C. CONNELL,
Chief Judge.

RE: PLAINTIFFS' APPLICATION FOR THE CONVENTION OF A 3-JUDGE COURT AND DEFENDANTS' MOTION TO DISMISS.

(Filed February 2, 1966)

CONNELL, *C. J:*

The plaintiffs are litigants involved in personal injury lawsuits filed in the Court of Common Pleas, Cuyahoga County, Ohio. Their Complaint alleges that constitutional and statutory provisions establishing the judicial structure in Ohio, whereby each county is guaranteed at least one judge in the court of general jurisdiction (the court of common pleas), operate to deprive the plaintiffs of equal treatment under the law. They aver that the counties encompassing urban areas with larger populations, in particular Cuyahoga County, have fewer judges per population unit and that the disproportionate number of judges operates to their prejudice by causing them to wait longer for the completion of their litigation than litigants in smaller counties.

The genesis of this suit is the United States Supreme Court's dramatic reapportionment cases which require that the number of representatives returned to legislative bodies from political subdivisions within the state must be apportioned among the state's political subdivisions in relation to the population of said subdivisions. Our attention is especially directed to *Nolan v. Rhodes*, 378 U. S. 556 (1964), which struck down that provision of the Ohio Constitution which required that each county in Ohio have one representative in State House of Representatives. Plaintiffs here claim that as litigants in a heavily populated county, with one judge per 75,000 people, they are forced to endure a waiting period of some three or four years[1] while litigants in a smaller county may have a waiting period of perhaps one year, perhaps two years. Implicit in their demands here is the somewhat questionable premise that the *sole*[2] cause of this delay is the insufficent number of judges in larger counties and that the panacea for delay is an increase in that number to be effected by the apportionment of judges solely upon the basis of population within the jurisdiction which each judge serves. The plaintiffs claim that the presence of one common pleas

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[1] The plaintiffs would have us presume that a three to four year delay is necessarily prejudicial in every case. There are provisions which permit the advancement on the docket of cases in which one or the other party can show possible prejudice by delay (Cf. Common Pleas Court Rule 16); the plaintiffs would have us presume that these measures are necessarily ineffective and that, despite their availability, all plaintiffs who must wait three to four years for justice are necessarily prejudiced.

[2] We can take judicial notice of many studies and surveys which have been made in urban areas which have attempted to expose the causes of docket backlog and to suggest some possible remedies. While the number of judges serving in each county is necessarily a significant factor, it is not the only one. We can take judicial notice of a dearth of qualified trial lawyers. We are well aware of the reluctance of the members of the bar to work through the summer months. We can take judicial notice of the weather which makes Cuyahoga County Common Pleas Court an uncomfortable oven during the summer months, thus rendering the building unusable for jury trials. It is therefore quite obvious that the number of jurists within the county is not the *sole* factor occasioning delay.

judge sitting in Vinton County, with its population of 10,000 people, secures for litigants in Vinton County a preferential treatment under color of law and deprives litigants in Cuyahoga County of an equal opportunity for speedy justice. We are asked to recognize a federal constitutional mandate, imbedded in the Equal Protection Clause of the Fourteenth Amendment, which forbids the operation of such a judicial system, and we are asked to convene a three-judge court to enjoin the further operation of that judicial court.

We are surprised that the plaintiffs would have us reapportion only the judges in the trial courts of the state. Should we not also reapportion the number of sheriffs and their deputies so that litigants in heavily populated counties will have an opportunity to secure quicker service of process? Should we not also reapportion the number of clerks of court and their deputies so that litigants in heavily populated counties will have more expeditious processing of the paper work involved in litigation? Since the prejudicial delay is also caused by a paucity of trial lawyers, shall we, considering lawyers as officers of the court (to satisfy the "state action" requirement for invoking the Fourteenth Amendment), reapportion their number among the eighty-eight counties of Ohio? And if this Court can affect the destinies of men by amending an entire judicial structure, what of mere brick and mortar? Should we not also reapportion the number of courthouses and courtrooms in the various counties?[3] These questions supply their own answers.

The plaintiffs thus would plunge us headlong into that thicket of explosive political questions against which Mr.

[3] This is a question of great practical necessity in the instant lawsuit because there are no empty courtrooms in the Cuyahoga County Courthouse.

Justice Frankfurter so wisely warned us in *Colgrove v. Green*, 328 U. S. 540 (1946).

This case is presently before us for the consideration of two motions: the plaintiffs' application for the convention of a three-judge court and defendants' motion to dismiss. Ordinarily, it is neither the function nor the prerogative of the district judge to whom is addressed an application for a three-judge court under 28 U. S. C. § 2281,[4] to consider the merits of the plaintiffs' alleged grievance.

> When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713, 715 (1962).

Where the allegations of the complaint, taken as true, fashion a grievance of constitutional proportions brought about by the operation of a state statute, § 2281 requires that the district court convene a three-judge panel. However, that section is inapplicable—

> * * * when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent. * * * The reasons for convening an extraordinary court are inapplicable in such cases, for the policy behind the three-judge requirement—that a single judge ought not to be empowered to invalidate

[4] § 2281. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

> a state statute under a federal claim—does not apply. The three-judge requirement is a technical one to be narrowly construed, *Phillips v. United States,* 312 U. S. 246, 251. The statute comes into play only when an injunction is sought "upon the ground of the unconstitutionality" of a statute. There is no such ground when the constitutional issue presented is essentially fictitious. *Bailey v. Patterson,* 369 U. S. 31, 33 (1962).

Thus, when a complaint is patently without merit in law, as is the plaintiffs' here, a single district judge is empowered, as he is in every civil case, to dismiss the complaint for "failure to state a claim upon which relief can be granted." Rule 12(b)(6) Federal Rules of Civil Procedure.

The judicial system of the State of Ohio originates in the Ohio Constitution, specifically Article IV, where it is provided, *inter alia*:

> Section 1. The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law.

and that (Section 3):

> One resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law shall be elected in each county by the electors of such county; * * *. Any judge of the court of common pleas may temporarily preside and hold court in any county; and * * * the chief justice of the supreme court of the state * * * may assign any judge to any county to hold court therein.

And that (Section 15):

> Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; * * *.

Ultimately, then, the allocation of judges in the respective counties of Ohio is left to the informed deliberation of the state legislature, as it should be, rather than with the inadequately informed discretion of the federal court. The problem of which the plaintiffs complain, and the difficulties inherent in its resolution, necessarily pose questions of a political nature which are not ripe for solution by the judicial process. The issues thus joined, therefore, are not justiciable.

While we recognize that a precise definition of that elusive term "political issue" is at best a semantic improbability and that the term is best described by example rather than by sweeping generalizations, there are enough consistently recurring characteristics to render the term definable. These are best summarized by Mr. Justice Brennan in *Baker v. Carr,* 369 U. S. 185, 217 (1962):

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Even a casual comparison between the allegations of the complaint before us and the criteria suggested by the

Supreme Court indicates that we are presented with a "political question."

Plaintiffs do not suggest that we have the power to create any new judgeships and in that way expand the number of jurists sitting in heavily populated counties; the question, then, is whether each county is entitled to have its own judge or whether we must strike down that requirement and reassign judges from sparsely populated counties to the urban counties. We perceive of no judicially discoverable and manageable standards for resolving this issue. If a court of three judges were to be convened, we would require evidence from every county in Ohio relative to the volume of litigation[5] in that county and to the necessity of having a jurist available at each county seat. If we were to undertake an independent resolution of the questions posed by this complaint, we would necessarily express a lack of respect for the bona fide attempts by the Ohio Legislature to increase the number of judges in urban counties to alleviate docket congestion. (*Cf.* 131 Ohio Laws 165; 130 Ohio Laws 151; 128 Ohio Laws 147; 127 Ohio Laws 475; 126 Ohio Laws 778.) For these reasons it is the opinion of this Court that the attempted resolution of the political questions raised here would be an encroachment upon an area generally preserved for legislative determination.

As much as we abhor the judicial pursuit of questions essentially political in nature, we cannot abdicate our judicial duty to redress grievances arising from violations of federal constitutional rights. Therefore, if the plaintiffs have accurately framed a cause of action based upon the

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[5] Delay in the process of litigation, which is the real evil complained of, is related to the volume and type of litigation in each court. The volume and character of litigation is not solely related to the population of each jurisdiction; therefore, population cannot be the sole determination of the number of judges per county.

Equal Protection Clause they are entitled to go forward, for the judicial standards by which we appraise such claims:

> * * * are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action. *Baker v. Carr,* 369 U.S. 186, 226 (1962).

In evaluating the alleged constitutional infirmity of state legislation, we are mindful that:

> No finicky or exact conformity is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial reexamination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded. See *Goesaert v. Cleary,* 335 U. S. 464. And what degree of uniformity reason demands of a statute is, of course, a function of the complexity of the needs which the statute seeks to accommodate. *McGowan v. Maryland,* 366 U. S. 420, 524 (1961). (Concurring Opinion, Frankfurter, J.)

It is apparent that the one judge per county rule, here under attack, is a product of Ohio's desire to have a court of general jurisdiction located conveniently within each county. Is this unreasonable? We think not. Convenience is an essential factor in arranging an effective judicial system, since it is often necessary for a judge to hear emergency measures, to-wit: motions for temporary restraining orders, applications for the writ of habeas corpus, applications for the issuance of search warrants and arrest warrants, and preliminary hearings and the fixing of bail in criminal matters. In short, it is not irrational to supply

each county with a judge so situated therein as to be within the convenient reach of any potential litigant. We cannot say, then, that the Ohio constitutional guarantee that each county has its own judge suggests any departure from reason so as to bring that provision into conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In conclusion, we recognize that the plaintiffs have attempted to draw a close analogy to the legislative reapportionment cases, but they have failed to grasp the thrust of that line of authority. The first principle inherent in our republican form of government is that individual citizens submit to rule by legislative fiat enacted by a majority of a popularly elected legislative body working within a constitutional framework. When the representatives to that legislative body are malapportioned among the several districts within the political unit, then the voting strength of the individual citizens in these subdivisions is of unequal weight. It is the dilution of power in the vote of citizens situated in districts suffering from inadequate representation which brings into play the Equal Protection Clause. And there can be no reasonable justification for a system of apportionment which ignores the relative population of each political subdivision because "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Reynolds v. Sims,* 377 U. S. 533, 562 (1964). Thus the ratio which the population of each political subdivision bears to the population of the whole political unit has become, right or wrong, the sole criterion for judging the equality of representation and voting strength for the individual citizens within each political subdivision.

But in determining the reasonableness of a judicial system which permits at least one judge operating a court of

general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. Judges do not represent people, they serve people. They must, therefore, be conveniently located to those people whom they serve. Location, then, is one of many significant factors which the legislature may properly consider when carrying out its constitutional mandate to create an effective judicial system. The State constitutional provision requiring one judge per county bears a reasonable relation to the State's aim: a conveniently effective judicial system; the efforts heretofore by the legislature to increase the number of jurists in populous counties reflect no departure from reason. Therefore we see no constitutional basis for the plaintiff's complaint. On the contrary, we recognize, as a matter of law, that the relative population of the counties of Ohio can not be, as the plaintiffs argue, the sole criterion of apportioning judges among the counties.

The plaintiffs' complaint, therefore, must be and is dismissed.

JAMES C. CONNELL,
Chief Judge.

Dated Feb. 2nd, 1966.

AMENDED COMPLAINT FILED IN THE DISTRICT COURT

No. C 65-159.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

NATHANIEL BUCHANAN, *etc., et al.*,
Plaintiffs,

vs.

THE HONORABLE JAMES A. RHODES, *etc., et al.*,
Defendants.

1. This Court has jurisdiction of the subject matter of this action by reason of the provisions of the United States Constitution, Amendment XIV, Section 1, and the provisions of 28 U. S. C. 1331(a), 1343(3), 1357, 2201, and 42 U. S. C. 1983 and 1988. The amount in controversy herein exceeds Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

2. Plaintiffs are all residents and citizens of Cuyahoga County, Ohio. All plaintiffs, except those identified as minors, are also electors and taxpayers of Ohio. Plaintiffs Nathaniel Buchanan, Gdn., Mary Janda, Joseph Kondek, Joseph Makransky, Katheline McCabe, Patricia McClanahan, Carla Merlini, Robert Nagle, Mary Stack, Vergil Tweed, Madlyn Verhage, Marion Vinocur, and Elsie Thomas presently have pending civil actions for damages in the Court of Common Pleas for Cuyahoga County as parties plaintiff. Plaintiffs David I. Sindell, Joseph M. Sindell, Philip J. Bourne, Curt E. Stern, and Keith E.

Spero are all members of the Bar of the State of Ohio in good standing and are actively engaged in the practice of law in the courts of Ohio, including particularly the Court of Common Pleas for Cuyahoga County. Each of the plaintiffs brings this action on behalf of himself and all other persons in his identified class (i.e., "residents and citizens of Cuyahoga County." "electors and taxpayers of Cuyahoga Coutny," and "attorneys engaged in the practice of law in Cuyahoga County"). The above named members of the Ohio Senate and the Ohio House of Representatives are named in their representatives capacities and as members of the classes of persons who are members of those two governmental bodies. With respect to each of the classes of persons named above, the representative defendants are acting in accordance with Rule 23 of the Federal Rules of Civil Procedure since the number of persons in each such class is so numerous that it is impracticable to bring all members of such class before the court, the named representatives of each such class will fairly insure the adequate representation of the entire class, the rights sought to be enforced are common to each member of each class and several to each member of each class, and there are common questions of law and fact affecting the several rights and common relief sought with respect to each member of each class.

3. Under the provisions of the Ohio Constitution, the court of common pleas is the trial court of general jurisdiction for the hearing of civil and criminal matters. Article IV, Section 3 of the Ohio Constitution provides that there shall be one judge of the common pleas court who is resident in and regularly assigned to each of Ohio's eighty-eight (88) counties. The Ohio legislature, consisting of the Ohio Senate and the Ohio House of Representatives, has enacted Ohio Revised Code Section 2301.02, which

designates the numbers of common pleas judges assigned to regularly hear cases in the various Ohio counties.

4. By reason of the provisions of the Ohio Constitution, Article IV, Section 3, and the provisions of Ohio Revised Code Section 2301.02, in 1964 eighteen (18) Ohio counties were represented by and served by common pleas judges at a ratio of one judge for each 25,000 persons or less (Henry Co., Brown Co., Fayette Co., Union Co., Meigs Co., Wyandot Co., Holmes Co., Carroll Co., Hocking Co., Adams Co., Morrow Co., Pike Co., Harrison Co., Paulding Co., Monroe Co., Morgan Co., Noble Co., and Vinton Co.) At the same time, during the calendar year of 1964, Cuyahoga County and seven (7) other counties were represented by and served by common pleas judges with the ratio of 75,000 or more persons for each such judge (Cuyahoga Co., Hamilton Co., Montgomery Co., Lucas Co., Licking Co., Clermont Co., Muskingum Co., and Wayne Co.).

5. By reason of changes made in the Ohio Revised Code Section 2301.02, slight changes were made for 1965 in the numbers of common pleas judges assigned to and provided for Cuyahoga County and five other counties from those enumerated above: Hamilton Co., Montgomery Co., Lucas Co., Licking Co., and Clermont Co. However, there still remains a gross inequality of representation for the citizens, residents, taxpayers, litigants, and electors of Cuyahoga County (including particularly these plaintiffs) in comparison with the eighteen (18) enumerated counties listed above having 25,000 or less persons per common pleas judge. The ratio of population represented per judge in Cuyahoga County as compared with those eighteen (18) counties is approximately three to one, so that each citizen of Cuyahoga County has approximately one-third (⅓) of the representation on the Ohio common pleas bench as the

citizens of those enumerated eighteen counties. The representation by common pleas judges for citizens of Cuyahoga County is likewise grossly disproportionate as compared with numerous other counties of the State of Ohio. By reason of this gross disproportion in representation, the plaintiffs have been denied the equal protection of Ohio laws as residents, citizens, taxpayers, and electors of Cuyahoga County.

6. As a result of the long standing nature of this gross disproportion in representation, the judges of the Court of Common Pleas sitting in Cuyahoga County have been unable to maintain a current docket. There were outstanding at the end of the calendar year 1964, 17,350 cases on the docket of the Court of Common Pleas for this county. The metropolitan nature of Cuyahoga County has caused an even greater case load upon the Common Pleas Court for this county in proportion to the case loads of less urban counties. During the calendar year 1964, more than 800 new cases were filed for each judge assigned to Cuyahoga County and to the judges in twelve (12) other counties, while less than 300 cases were filed for each common pleas judge in thirty (30) Ohio counties.

7. As a result of these and other circumstances, the average delay in the time for the hearing of an ordinary civil action for damages, from the date of filing of such action to the date of trial, is now approximately four (4) years in Cuyahoga County, while the delay in hearing such cases in numerous other counties averages less than one (1) year. Similar unreasonable and disproportionate delays are suffered in the Cuyahoga County Common Pleas Court in criminal matters and other civil matters. Consequently, the plaintiffs are being denied equal protection of Ohio laws as compared with similar persons in other

counties and are being denied their rights without due process of law by reason of the extraordinary and unreasonable delay in the hearing of such matters.

8. The plaintiffs are now suffering irreparable damages by reason of the continued violation of their rights under the United States Constitution as set forth above.

9. The Honorable Kingsley A. Taft is the duly elected and acting Chief Justice of the Ohio Supreme Court. By reason of Article IV, Section 3 of the Ohio Constitution, the Chief Justice of the Ohio Supreme Court has the power to assign any judge of an Ohio common pleas court to hold court in any other county on a temporary basis.

10. The Ohio Senate is brought into this action on a representative basis by defendants Anthony O. Calabrese, John J. Corrigan, and David T. Matia. The Ohio House of Representatives is brought into this action on a representative basis by defendants Anthony O. Calabrese, Jr., James P. Celebrezze and John F. Corrigan. Each of these named representative defendants is a duly elected and acting member of the respective legislative body. Under the provisions of Article IV, Section 3 of the Ohio Constitution, the legislature of Ohio has the power to enact laws which will create the positions of common pleas judge and to allocate such positions among the several counties of Ohio.

11. The defendants Frank M. Gorman, Henry W. Speeth, and William P. Day are named in their official capacity as County Commissioners for Cuyahoga County, Ohio, to which positions they were duly elected and in which positions they are now serving. Sections 307.01 and 307.02 of the Ohio Revised Code require the County Commissioners to provide a courthouse, courtrooms, and appropriate furnishings, equipment, and facilities for common pleas judges sitting and acting within their respective counties.

12. The Honorable James A. Rhodes is the duly elected and acting Governor of the State of Ohio and the chief executive of Ohio in the enforcement of the Constitution and the laws of the State of Ohio.

WHEREFORE, plaintiffs pray judgment as follows:

(a) That this Court declare that the provisions of the Ohio Constitution, Article IV, Section 3 which require at least one common pleas judge for each Ohio county are in violation and contravention of the United States Constitution, Amendment XIV, Section 1.

(b) That this Court declare that the provisions of Ohio Revised Code, Section 2301.02 which allocate and apportion judges of the courts of common pleas among the several counties of Ohio are in violation and contravention of the United States Constitution, Amendment XIV, Section 1.

(c) That this Court order and direct by mandatory injunction that the Ohio Senate and the Ohio House of Representatives establish a new plan for reapportionment of the Ohio common pleas judges so as to more nearly provide an equal protection of the laws to the plaintiffs and other persons in the same or similar circumstances and so as to prevent the continued deprivation of the property rights without due process of law of the plaintiffs and other persons similarly situated by reason of extraordinary and unreasonable delays in the adjudication of cases in the common pleas courts.

(d) That this Court order and direct the Chief Justice of the Ohio Supreme Court by mandatory injunction to reassign temporarily the various common pleas judges to Cuyahoga County and other counties similarly situated so as to provide more nearly an equal protection of the laws to the plaintiffs and persons similarly situated and so as to provide a more speedy adjudication of cases for Cuya-

hoga County and other counties similarly situated, until such time as permanent reapportionment is accomplished.

(e) That, in the alternative, if the Chief Justice of the Ohio Supreme Court fails to adopt a suitable program of reassignment following order by this Court, that this Court shall itself approve and order into effect a program of reassignment of common pleas judges on a temporary basis. And, if the Ohio legislature fails to adopt and enact a permanent program of reapportionment and reassignment of Ohio common pleas judges following an order by this Court, that this Court shall approve and enforce such a program of permanent reapportionment and reassignment of Ohio common pleas judges.

(f) That this Court order the County Commissioners for Cuyahoga County to provide suitable and adequate courtrooms, equipment, and facilities for such additional judges as shall be necessary to accomplish the above described purposes.

(g) That this Court grant temporary relief during the pendency of this action in accordance with Rule 65 of the Federal Rules of Civil Procedure.

(h) For such other legal and equitable relief as this Court shall deem just and appropriate.

RICHARD M. MARKUS,
Attorney for the Plaintiffs.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 259.

JAMES A. RHODES, etc. *et al.*,
Petitioners,

vs.

NATHANIEL BUCHANAN, *et al.*,
Respondents.

MEMORANDUM BY RESPONDENTS WITH REGARD TO PETITION FOR WRIT OF CERTIORARI.

RICHARD M. MARKUS,
1400 Leader Building,
Cleveland, Ohio 44114,
Attorney for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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MEMORANDUM BY RESPONDENTS WITH REGARD TO PETITION FOR WRIT OF CERTIORARI.

Because of the importance of the subject matter involved in this action, Respondents do not choose to oppose the Petition that has been filed for the issuance of a Writ of Certiorari. This case involves the authority of the Federal Courts to review and remedy apportionment of judges in the State Courts, where the apportionment established by State law contravenes the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Following the dismissal of this action by the United States District Court for the Northern District of Ohio, and the refusal by that Court to convene a statutory three-judge court, Respondents sought review of that decision in this Court by direct appeal. In *Buchanan v. Rhodes*, 385 U. S. 3 (1966), this Court dismissed the appeal, apparently finding that this Court did not have appellate jurisdiction to review the District Court's action. Citing that decision, this Court subsequently expressly held that

such review is properly available in the Court of Appeals. *Schackman v. Arnebergh,* 387 U. S. 427 (1967).

An appeal was therefore prosecuted to the Federal Court of Appeals for the Sixth Circuit which reversed the District Court's action and remanded the case for the convening of a three-judge court. In so doing, the Court's action was consistent with the decision of this Court in *Idlewild v. Epstein,* 370 U. S. 713 (1962). In that case, the opinion states at 370 U. S. 715:

> "When an application for a statutory three-judge court is addressed to a District Court, the Court's inquiry is appropriately limited to determining whether the Constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

Applying those standards, the Court of Appeals remanded the case to convene a three-judge court as requested by plaintiffs.

While the various reapportionment cases previously considered by this Court have not involved judicial apportionment, other courts have been concerned with that subject. Thus, in *Romiti v. Kerner,* 256 F. Supp. 35 (E. D. Ill. 1966), the district court did assemble a three-judge court to consider an alleged mal-apportionment of the Supreme Court of Illinois. In *Kail v. Rockefeller,* Civil No. 65-205 (E. D. N. Y. 1966) the district court did assemble a three-judge court to consider a claim of mal-apportionment of the New York State trial judges. In *New York Trial Lawyers Ass'n v. Rockefeller,* 267 F. Supp. 148 (S. D. N. Y. 1967), the District Judge refused to assemble a three-judge court to review substantially the same claims of mal-apportionment in New York. And in

Stokes v. Fortson, 234 F. Supp. 575 (N. D. Ga. 1964), the district court approved the convening of a three-judge court to review claims of Fourteenth Amendment violations in the election of the Georgia judiciary.

Petitioners in the present case assert that the district courts of the United States generally lack jurisdiction to entertain actions of this nature. While we believe that the district courts can and should be concerned with the apportionment of the state judiciary, we recognize that the problem extends far beyond the City of Cleveland and the State of Ohio. Judicial delay is perhaps the most grievous problem facing the administration of justice today. The problem is particularly acute in the larger metropolitan areas. Therefore, to the extent that this widespread problem involves federal Constitutional questions, any doubt as to the jurisdiction of the district courts nationally to review such questions should be resolved. Further, in the interest of conserving judicial time and energies, this Court may well wish to set forth certain basic guidelines for use in such litigation in the district courts.

CONCLUSION.

For the above reasons, Respondents acquiesce in the Petition filed seeking a Writ of Certiorari from this Court.

Respectfully submitted,

RICHARD M. MARKUS,
1400 Leader Building,
Cleveland, Ohio 44114,
Counsel for Respondent.